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Mediation of Construction Cases Using "Blind Negotiations": Can Providing Less Information Generate Better Results?

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MEDIATION OF CONSTRUCTION CASES USING “BLIND NEGOTIATIONS”: CAN PROVIDING LESS INFORMATION GENERATE BETTER RESULTS?

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I. INTRODUCTION

Mediators face daunting challenges, even in the simplest of cases. Parties and their counsel ask mediators to transform conflict into concurrence and disputes and hostility into agreements and harmony. To succeed, a mediator must quickly master the material facts, develop rapport and trust with the parties and counsel, present and articulate both sides of disputed issues, and ascertain mutually agreeable solutions to all disputed issues. Once the mediator completes those tasks and helps the parties negotiate an

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agreement, he must then be able to document that agreement in a written, coherent, and enforceable agreement.

Mediation and the mediator's role are inherently difficult. The difficulty, however, increases exponentially in cases with multiple parties, extensive lists of disputed factual issues, complex legal and contractual disputes, large damages claims, insurance disputes, and heightened emotions. The typical construction case presents most of these factors and accounts for why construction cases can be difficult, challenging, time consuming, and frustrating for all parties involved in the process.

However, the existence of these factors also explains why almost all construction cases are mediated.¹ Simply stated, the same complexities of construction cases that make mediation challenging are the same complexities that make construction cases so difficult to try or arbitrate and predict the ultimate outcome.²

Despite their difficulty, construction cases are most frequently mediated to successful conclusion.³ Factors that enhance the probability of success are usually within the control of the mediator.⁴ Therefore, when faced with large and complex construction cases, the mediator should consider not only basic mediation tactics, but also alternative approaches.

One tool a mediator should consider to facilitate the mediation process is the use of the blind settlement process. In blind negotiations, the mediator negotiates with confidential numbers from all the parties and discloses only the gap between the claimants' demand and the defending parties' collective offers. Individual contributions or the final settlement amount remain confidential throughout the mediation process.

This article will explore the factors that make construction cases and mediation of construction cases difficult.⁵ After identifying the hurdles to successful construction mediation, the article will then focus on the benefits of the use of a blind

1. Richard P. Flake & Susan G. Perin, *Mediating Construction Disputes: What Works and What Doesn't*, DISP. RESOL. J., May-July 2003, at 24-26.

2. *Id.* at 34. Flake and Perin note that construction cases are "notoriously complex." *Id.* at 26.

3. John P. Madden, *Recipe for Success in Construction Mediation*, DISP. RESOL. J., May-July 2001, at 16, 18. Madden indicates that more than eighty-five percent of construction disputes settle successfully. *Id.*

4. *Id.* at 21. Two out of the four factors for success that Madden notes are squarely within the control of the mediator: knowledge of the facts in dispute and expertise in the subject matter. *Id.*

5. *Infra* Part A.

settlement process.⁶ The discussion and analysis regarding the use of a blind settlement process will focus on the context of construction disputes.

II. THE COMPLEXITY OF CONSTRUCTION CASES

Construction projects produce an abundance of litigation. The construction project begins as an intangible idea or desire in the mind of the owner. The owner conveys his intangible idea and desire for the project to an architect, an engineer, or a design-builder. The design professional then works with the owner to quantify and define the owner's thoughts and to develop tangibly a final design for construction. The process continues as the project goes from paper to actual construction. Throughout the process, the project evolves and changes up to the date of completion.

The disparate interests of all the parties participating in a construction project increase the potential for disputes or claims. The owner wants the project done quickly, to the highest level of quality, and at the lowest cost.⁷ The design professional works to prepare a design that meets the owner's desires and budget constraints. Further, the design professional seeks to convey all required information, coordinate all disciplines, maintain a budget, and still allow the contractor to exercise control over the means and methods of construction. Finally, the contractor desires to complete the project as specified and to maximize profit on the project. To this end, the contractor is interested in minimizing costs and does so by completing only the work specified without any extras. However, this often causes the contractor's vision of the project to vary significantly from the vision of the owner or the design professional.⁸

The large number of participants is another key factor that increases the potential for claims on construction projects.⁹ On any

6. *Infra* Part E.

7. E.g., Susan Conbere & Asa Foss, *More, Better, Faster, Cheaper: Technology Solutions for Advancing the Homebuilding Process*, CAL. BUILDER, <http://www.cabuilder.com/internal.asp?pid=107> (discussing recent trends in the construction industry's strategies for efficiency and cost-effectiveness) (last visited Nov. 15, 2007).

8. See generally Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463 (discussing the divergent interests of the various parties to a construction contract).

9. Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 478 (1987) (stating that parties to a prime

given project, the owner may contract with several different entities in order to create a project.¹⁰ The owner may contract with an owner's representative, a construction manager, an architect, an engineer, and a general contractor.¹¹ Each of these parties may in turn retain sub-consultants or subcontractors to complete the project.¹² The general contractor in almost all circumstances will enter into several subcontracts and supply agreements to complete the project.¹³ In short, the higher the number of participants in a project, the greater the likelihood of claims and complexity of legal issues and disputes that arise from the project.¹⁴

As the potential claims increase, the mediation of construction disputes becomes more complicated. Many construction disputes arise from or relate to the claimed existence of design or construction defects on a project.¹⁵ The list of design or construction defects can range from fairly small (one to three) to enormous (hundreds to thousands).¹⁶ The disputes are further complicated if they involve scheduling, delay, or acceleration claims. In those cases, virtually every aspect of the construction project becomes material and critical in determining cause and responsibility. If managed improperly, those types of legal issues can cause a single lawsuit to morph into countless individual "mini lawsuits."¹⁷

Further complicating the mediation of construction disputes are the issues of risk shifting, risk avoidance, or collections. In many construction cases, the existence and enforceability of insurance coverage, surety protection, indemnity agreements, or other risk management devices can significantly complicate resolution of construction disputes.¹⁸ General liability insurers

contract for construction seldom go into battle in isolation).

10. *Id.* at 478-79.

11. *Id.* See also cases cited *id.* at 478 n.40.

12. *Id.* See also cases cited *id.* at 479 n.42.

13. *Id.* at 479.

14. *Id.* at 479-80. See also 2 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 51:1 (3d ed. 2006).

15. See Richard H. Glucksman & Glenn T. Barger, *Managing Construction Defect Cases*, CONSTRUCTION LAW., July 1996, at 7, 7-8 (discussing the typical legal progression when an owner files suit based on an alleged defect).

16. Cf. Debra Porgrund Stark & Andrew Cook, *Pay it Forward: A Proactive Model to Resolving Construction Defects and Market Failure*, 38 VAL. U. L. REV. 1, 6-8 (2003) (discussing the nature and extent of common construction defects).

17. See Stipanowich, *supra* note 9, at 479 nn.44-45 (citing numerous cases involving multiple derivative lawsuits).

18. Cf. Robert L. Meyers, III & Debra A. Perelman, *Risk Allocation Through*

frequently raise coverage issues that dramatically affect the ability of case resolution.¹⁹ Surety companies that may be involved in a mediation or construction loss will not only work hard to avoid unnecessary payments, but will also preserve and pursue indemnity or recovery of any payments made from their principals or indemnitors.²⁰ Further, indemnity agreements contained in subcontracts can dramatically change a party's liability exposure and insurance coverage.²¹ Anti-indemnification statutes and each state's interpretation of indemnity clauses also come into play.²² Finally, given the volatile nature of the construction industry, collection of claims is often a fundamental concern either because the contractor is insolvent or out of business, or because of insurance coverage questions.²³

Finally, a mediator and the parties must understand that on any given construction lawsuit, multiple mediations occur at any given time. Although an owner may have a single claim against the general contractor or the design professional, the general contractor and design professional are negotiating not only with the owner but also with subcontractors, sub-consultants, insurers or sureties, and one another. Each entity may also pursue affirmative claims against the project owner and each other.

Indemnity Obligations in Construction Contracts, 40 S.C. L. REV. 989 (1989) (discussing the legal complexities of indemnification in construction contracts).

19. CHRIS E. RYMAN, SETTLEMENT STRATEGIES: HOW AND WHEN TO SETTLE TO SAVE THE MOST MONEY FOR YOUR CLIENT 5-6 (presented to the DRI Construction Law Seminar, Sept. 9-10, 2004, Scottsdale, AZ), available at <http://www.coatsrose.com/upload/Broadcast86.pdf>.

20. See John W. Hinchey, *Surety's Performance Over Protest of Principal: Considerations and Risks*, 22 TORT & INS. L.J. 133, 137-38 (1986).

21. See, e.g., *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, 474-75 (Minn. 1992) (holding that a provision of a standard subcontract agreement, which required subcontractor to purchase liability insurance for all damages and injury to all persons and property resulting from or in any manner connected with execution of work provided for in subcontract, was enforceable promise to provide specific insurance coverage for benefit of others, rather than an unenforceable indemnification agreement).

22. See, e.g., MINN. STAT. §§ 337.01-.05 (2006) (reflecting Minnesota's anti-indemnification statutes, which, despite being labeled "anti-indemnification" statutes, set out the process that must be followed to generate enforceable broad form indemnity agreements); *Holmes*, 488 N.W.2d at 474-75.

23. See Lawrence Ponoroff, *Construction Claims in Bankruptcy: Making the Best of a Bad Situation*, 11 BANKR. DEV. J. 343 (1995) (describing the difficulties that construction litigants face in trying to recover money from insolvent parties).

After subcontractors or sub-consultants are added to the mix, they in turn negotiate with the owner, the general contractor, the architect, suppliers, insurers or sureties, and each other.

Given these complexities, the mediator must evaluate and consider every aspect of the mediation process, including the structure of negotiations, to maximize chances of successfully resolving construction disputes. In this regard, one option for the mediator to consider is the use of blind settlement negotiations.

III. MEDIATION CONFIDENTIALITY

A. *In General*

Confidentiality is a basic principal of the mediation process.²⁴ A confidential mediation process encourages participants to speak openly regarding their interests, concerns, and desires without fear that their disclosures will be used against them in court if the case does not resolve.²⁵ Most mediators confirm the existence and importance of the confidential nature of mediation early in the process.²⁶ Many courts have expressed the belief that mediation confidentiality encourages settlements.²⁷ Parties are more likely to be open and honest with each other as well as the mediator. Accordingly, the likelihood of settlement increases because the parties know that the communications exchanged in mediation, and the ultimate agreement reached through mediation, would be excluded from evidence in any later proceedings.²⁸

The Uniform Mediation Act (UMA) drafted by the National Conference of Commissioners on Uniform State Laws²⁹ reflects the

24. Diane K. Vescovo et al., *Essay—Ethical Dilemmas in Mediation*, 31 U. MEM. L. REV. 59, 80 (2000).

25. CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION & SETTLEMENT § 16.08(8)(a) (5th ed. 2005).

26. *See id.*

27. Sarah Williams, *Confidentiality in Mediation: Is it Encouraging Good Mediation or Bad Conduct?*, 2005 J. DISP. RESOL. 209, 215 (2005).

28. *See In re Lake Utopia Paper, Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979) (remarking that a lack of confidentiality would constrain parties to conduct themselves in a “cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute”). *See also* David A. Ruiz, *Asserting a Comprehensive Approach for Defining Mediation Communication*, 15 OHIO ST. J. ON DISP. RESOL. 851, 856 (2000); SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 9 (2d ed. 1994 & Supp. 1997).

29. The National Conference of Commissioners on Uniform State Laws

importance and broad expectation of confidentiality in mediation proceedings.³⁰ The UMA addresses confidentiality in several respects. First, the UMA creates a privilege for mediation communications unless it is waived or precluded in other sections of the Act.³¹ The UMA buttresses this position with a confidentiality section.³² Section 8 of the UMA provides, "[u]nless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State."³³ The UMA provision restates commonly accepted practices regarding the confidentiality of mediation communications outside of the mediation process. Essentially, confidentiality becomes a matter of contract unless otherwise provided for in part by law or statute.³⁴

Different jurisdictions vary significantly with regard to the extent to which confidentiality of mediation communications or mediation results is protected.³⁵ Most jurisdictions protect communications made in mediation from discovery at least to some extent.³⁶ These laws addressing confidentiality of mediation communications have been categorized into three separate areas:

- 1) blanket confidentiality, whereby no disclosure of any mediation communications may be made (absolute confidentiality);
- 2) nearly absolute confidentiality, subject to enumerated exceptions, which vary by state statute, or disclosure only upon consent by all parties, including the mediator (enumerated confidentiality); or
- 3) qualified confidentiality, providing mediation confidentiality but expressly recognizing judicial discretion to order disclosure in individual cases where needed to prevent a manifest injustice or to enforce court orders.³⁷

(NCCUSL) is a non-partisan organization that drafts model legislation to bring clarity, stability, and uniformity to state laws. See <http://www.nccusl.org>. See also UNIF. MEDIATION ACT FINAL DRAFT (2001), available at <http://www.mediate.com/articles/umafinalstyled.cfm>.

30. UNIF. MEDIATION ACT (2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>.

31. *Id.* § 4(a).

32. *Id.* § 8.

33. *Id.*

34. *Id.* § 8 cmt. b.

35. Williams, *supra* note 27, at 216.

36. *Id.*

37. *Id.* (quoting Maureen A. Westin, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8

Laws passed in Ohio and California provide a good example of the first category, "Absolute Confidentiality."³⁸ The Ohio statute "renders all mediation communications confidential whether the mediation is court-annexed or arranged by the parties themselves."³⁹ The California statute also provides for absolute confidentiality of mediation communications.⁴⁰

Second, the UMA creates a category of protection called "Nearly Absolute Confidentiality," which several states have adopted.⁴¹ Although the UMA allows some flexibility, it also provides strong protection for mediation communications.⁴² This UMA protection safeguards confidentiality by creating a privilege to avoid the compelled disclosure of communications in subsequent litigation.⁴³ It prevents mediators from making disclosures to judges or from reporting on the status of any mediation.⁴⁴ The UMA exceptions to confidentiality are generally limited to threats of bodily injury, plans to commit a crime, evidence of abuse or neglect, evidence of professional misconduct or malpractice by the mediator, or misconduct or malpractice involving a party, non-party participant or party representative.⁴⁵

The third and the final category of protection that the UMA creates allows for mediation confidentiality but recognizes judicial discretion to order disclosure.⁴⁶ In Wisconsin, for example,

HARV. NEGOT. L. REV. 29, 49 (2003)).

38. CAL. EVID. CODE § 1127 (2007) (explaining that California law makes a mediator's testimony or writing inadmissible, making it confidential); OHIO REV. CODE § 2710.07 (2007) (establishing that Ohio law provides that "mediation communications are confidential to the extent agreed by the parties or provided by other sections of the Revised Code or rules adopted under any section of the Revised Code.").

39. Williams, *supra* note 27, at 216 (quoting COLE, *supra* note 28).

40. See CAL. EVID. CODE § 1119 (Supp. 2007). "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery" *Id.* § 1119(a).

41. See MassUMA Working Group, Modifications of the Uniform Mediation Act by States That Have Formally Adopted the UMA as of July 2007, <http://www.massuma.net/umachart.html> (last visited Oct. 16, 2007). As of July 2007, nine states had adopted some or all of the UMA. *Id.* These states are the District of Columbia, Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Vermont, and Washington. *Id.*

42. UNIF. MEDIATION ACT § 4 (2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>.

43. *Id.*

44. *Id.* § 5.

45. See, e.g., *id.* § 4.

46. See *id.* § 6(b)(1).

protects mediation communications in general, but expressly allows and recognizes judicial discretion to make exceptions to the general rule.⁴⁷ Although support for mediation confidentiality is well established, some individuals advocate the importance of disclosure of mediation communications or mediation results under certain circumstances.⁴⁸

Despite the UMA, Minnesota passed its own Civil Mediation Act.⁴⁹ This statute, however, is silent as to the issue of confidentiality.⁵⁰ The Minnesota General Rules of Practice for the District Courts, however, specifically addresses the confidentiality issue in the context of mediation.⁵¹ Rule 114.08 states that no evidence of any "ADR proceeding or any fact concerning the proceeding may be admitted in a trial . . . or in any subsequent proceeding involving any of the issues or parties to the proceeding."⁵² Rule 114.08 notes that "no statements made nor

47. WIS. STAT. § 904.085(4)(e) (2000) (stating that disclosure is allowed "if necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.").

48. Carrie Menkel-Meadow, *Public Access to Private Settlements*, in WHAT'S FAIR-ETHICS FOR NEGOTIATORS 507–18 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004).

49. Minnesota Civil Mediation Act, MINN. STAT. §§ 572.31–.40 (2006).

50. *See id.*

51. MINN. R. GEN. PRAC. 114.08 (2007).

52. *Id.* at 114.08(a). The full text of the rule reads as follows:

- (a) Evidence. Without the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.
- (b) Inadmissibility. Subject to Minn. Stat. § 595.02 and except as provided in paragraphs (a) and (d), no statements made nor documents produced in non-binding ADR processes which are not otherwise discoverable shall be subject to discovery or other disclosure. Such evidence is inadmissible for any purpose at the trial, including impeachment.
- (c) Adjudicative Evidence. Evidence in consensual special master proceedings, binding arbitration, or in non-binding arbitration after the period for a demand for trial expires, may be used in subsequent proceedings for any purpose for which it is admissible under the rules of evidence.
- (d) Sworn Testimony. Sworn testimony in a summary jury trial may be used in subsequent proceedings for any purpose for which it is admissible under the rules of evidence.
- (e) Records of Neutral. Notes, records, and recollections of the neutral are confidential, which means that they shall not be

documents produced in non-binding ADR processes which are not otherwise discoverable shall be subject to discovery or other disclosure.”⁵³ Further, Rule 114.08 confirms that “[s]uch evidence is inadmissible for any purpose at the trial, including impeachment.”⁵⁴

The appendix to Rule 114 reaffirms the concept of confidentiality. Rule IV, “Confidentiality,” states that “[t]he neutral shall maintain confidentiality to the extent provided by Rule 114.08 and 114.10 and any additional agreements made with or between the parties.”⁵⁵ Advisory comments on Rule 114 confirm that “[a] neutral should discuss issues of confidentiality with the parties before beginning an ADR process[,] including any limitations on the scope [or extent] of confidentiality”⁵⁶ Minnesota has not yet adopted the UMA, but the UMA is slated for consideration during the 2007–08 legislative sessions.⁵⁷

B. *Private Caucuses*

The current law in Minnesota and the rest of the United States reflects a strong preference that any negotiations occurring during mediation, or settlements resulting from mediation, are treated as confidential. A related question, however, is how the mediator should address information provided through separate caucus sessions during the mediation. In other words, does the mediator have the right or ability to share information provided by one party

disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes. No record shall be made without the agreement of both parties, except for a memorandum of issues that are resolved.

53. *Id.* at 114.08(b).

54. *Id.*

55. *Id.* at 114 app. R. IV.

56. *Id.*

57. MINNESOTA UNIFORM LAWS COMMISSION: AGENCY PROFILE (2006), <http://www.budget.state.mn.us/budget/operating/200809/nov/331188.pdf>. In its report regarding the 2008–2009 biennial budget, the Uniform Laws Commission addresses “Key Measures.” The *Agency Profile* states, “[d]uring the 2007–08 Minnesota legislative session, the Minnesota commissioners will likely bring to the legislature for consideration the following acts: Uniform Arbitration Act, Uniform Mediation Act, Uniform Correction of Defamation Act, Uniform Environmental Covenants Act, Uniform Limited Liability Company Act, Uniform Nonjudicial Foreclosure Act, Uniform Estate Tax Apportionment Act, Uniform Real Property Recording Act, and Uniform Revised Anatomical Gift Act.” *Id.*

in a private caucus with another party in a later caucus? The Minnesota General Rules of Practice for the District Courts provide that the mediator shall "maintain confidentiality" to the extent provided by the Rules and by "any additional agreements made with or between the parties."⁵⁸ Because the Minnesota rules and Minnesota statutes are silent as to the confidentiality or disclosure of material exchanged during the caucus sessions, the mediator early in the process must address this issue.

Mediators differ as to their approach of information exchanged during private caucuses. Some mediators treat the information as entirely confidential and agree to disclose information only upon explicit authorization.⁵⁹ Others take the position that all information provided in the caucus is public unless specifically designated as confidential.⁶⁰ A hybrid approach is to characterize all "factual" information disclosed during private caucuses as public information, but then characterize as confidential all other information regarding tactics, strategy, negotiation goals, or other related "non-factual" material.⁶¹ Regardless of the approach taken, the mediator must make clear how he will treat information provided during the private caucuses. Failure to do so may result in improper or unintended disclosure of confidential information.⁶²

C. *Negotiating in the Blind*

The vast majority of published material regarding mediation confidentiality addresses the issue of confidentiality only with regard to disclosure and admissibility of information outside the mediation process or with regard to the private caucus.⁶³ In multi-party cases, however, the concept of confidentiality can be carried one step further and used to shield or limit information regarding the parties' negotiated positions. This circumstance is referred to as the "blind" or "double blind" approach to negotiations.⁶⁴

58. MINN. R. GEN. PRAC. 114.08 app. R. IV.

59. Vescovo et al., *supra* note 24, at 81.

60. *Id.*

61. The author's practice is to explain this approach to each party at the commencement of mediation or in the first caucus session.

62. Vescovo et al., *supra* note 24, at 81.

63. See, e.g., Flake & Perrin, *supra* note 1; Vescovo et al., *supra* note 24; Williams, *supra* note 27.

64. Robert A. Creo, *Emerging from No Man's Land to Establish a Bargaining Model*, 19 ALTERNATIVES TO HIGH COST LITIG. 191, 206-07 (2001).

When the mediator and parties elect to negotiate under a blind or double blind format, they dramatically reduce the extent of information provided to each party regarding interim settlement positions. The mediator typically publishes the claimant's opening demand to all defending parties. From that point forward, until either the case settles or the parties reach impasse, the mediator negotiates with confidential numbers from all parties.⁶⁵ Under this approach, the mediator will not disclose a single party's settlement offers or demands to any other party up to and through the final settlement or impasse.⁶⁶ This process is discussed below in greater detail.

In response to the opening demand, the mediator will speak to all defending parties to confirm the claimants' opening demand and secure a contribution toward settlement from all defending parties. The mediator will then add up the contributions of all the defendants and disclose the total of these contributions to the claimant as the collective offer. The mediator will not disclose individual contributions from each defendant. After the plaintiff considers the opening offer and responds with a new demand, the mediator will keep the new demand confidential. Instead of disclosing the new demand, the mediator simply discloses to each defendant the gap between the claimant's new demand and the defendants' collective offer. Then, the mediator again meets with each individual defendant to determine if additional contributions can be secured toward settlement.

As the mediation progresses, the claimant will know the total amount offered by the defendants but will not know any individual contribution from a specific defendant. Each defendant will know the total amount it agreed to contribute toward a settlement and the gap between the demand and the collective offers. As the gap is reduced, each defendant can ultimately determine what contribution will be required on its behalf in order to reach a settlement point. If a settlement is reached, the claimant will know the total amount offered and ultimately accepted to settle the case. The claimant will not know, however, how the amount was raised or any individual defendant's contribution toward the settlement. Additionally, each individual defendant will not know the total settlement amount, but instead will know only its respective

65. *See id.* at 206.

66. *Id.*

contribution toward the settlement amount. Blind negotiation prohibits any single party from knowing what the other parties contributed to the final settlement. Further, no party other than the claimant will know what the claimant accepted as a final settlement amount.

To illustrate how blind negotiation of multi-party cases works, consider the example of a typical construction defect claim. Assume that the claimant developed a large condominium project and brought suit against six defendants: the design professional, the general contractor, a product manufacturer, and three subcontractors. The claimant's opening demand to settle the claim is \$1 million. That number is communicated to each of the six defendants. In response, the mediator solicits responses from each of the defendants. The defendants contribute a total of \$300,000 as their opening response to the demand. The individual contributions are as follows:⁶⁷

Design professional	\$100,000
General Contractor	\$100,000
Product manufacturer	\$25,000
Subcontractor 1	\$25,000
Subcontractor 2	\$25,000
Subcontractor 3	\$25,000

Under the blind approach, when the mediator returns to speak with the claimant, the mediator conveys an offer of \$300,000 but does not detail individual contributions. Assume the claimant rejects the offer but responds with a demand of \$750,000. Upon returning to the defendants, the mediator does not disclose the total amount offered to the plaintiff. The mediator also does not disclose the total amount now demanded by the owner. The mediator simply advises each defendant that the gap in settlement positions has been reduced to \$450,000, and confirms with each defendant in confidence the amount of money used from that individual defendant to establish the current gap. The mediator then discusses with each defendant the possibility of securing additional settlement authority, or other pertinent issues. By disclosing the gap, the mediator confirms that the case will settle if

67. Stated contributions are hypothetical only and are not intended to reflect any allocation or history of payments in past mediations or the author's opinion as to appropriate or proportionate contributions on any given case.

he can secure additional settlement contributions from the defendants and/or additional settlement concessions from the claimant totaling \$450,000.

To carry this hypothetical one step further, assume that in the second round of negotiations the defendants increase their individual contributions as follows:

Design professional	\$200,000
General Contractor	\$150,000
Product manufacturer	\$50,000
Subcontractor 1	\$50,000
Subcontractor 2	\$50,000
Subcontractor 3	\$50,000

After completing the second round of negotiations, the mediator again reports to the claimant. The mediator advises that he secured increased contributions totaling \$550,000. Again, individual contributions are not disclosed to the claimant. In response, the claimant either accepts the money or makes another demand. Assuming the claimant rejects the offer but agrees to settle for \$650,000, the mediator again returns to the defendants and advises the defendants that the new gap in settlement positions is \$100,000. This process continues until either the case is settled, because the gap has been filled, or until the parties no longer move and reach impasse.

Variations of the blind negotiation approach exist. Some mediators have used a completely blind process among parties where the gap is not disclosed between the parties.⁶⁸ Instead, the mediator may publish an opening position from the claimant and the opening position from the defendants. The mediator then approaches each party in a serial and parallel manner to solicit their successive bids or moves. The mediator only discloses whether another party is actively moving or that progress is being made toward settlement.⁶⁹ When the parties are almost in agreement or at agreement, the mediator either discloses the gap and suggests final numbers to settle or discloses that the case actually settled.⁷⁰

68. Creo, *supra* note 64, at 207.

69. *Id.*

70. *Id.*

Another blind negotiation approach is referred to as the "safety deposit box" method. Under this approach, the mediator asks each party to put his bottom line number into a safety deposit box.⁷¹ The mediator then advises that if the numbers overlap, the midpoint of the numbers shall be the settlement amount. If any significant gap exists based upon these blind numbers, then the parties are told that a gap exists but are not told of the other side's number or the size of the gap.⁷² The parties are then told that they may keep their number confidential, disclose their number, or agree to mutual disclosure.⁷³ If the parties are close to agreement, the mediator identifies a number, which in his opinion would settle the case. If a large gap exists, the numbers may be disclosed or the mediator may continue to work and disclose only the extent of the gap.⁷⁴

Another variation of the blind approach is the "double blind" mediator's proposal.⁷⁵ Under this approach, the mediator proposes last and final numbers to all parties.⁷⁶ The mediator then asks for only a "yes" or "no" response. If all parties answer "yes," the case is resolved. If any party answers "no," the case continues. A party answering "no" is not entitled to know the response of the parties.⁷⁷

The blind methods of mediation are not appropriate for every case. The mediator needs to determine whether the facts, law, and relative settlement positions of the parties indicate that blind negotiations would be productive. At times, the mediation process benefits from open disclosure of all settlement positions, in which case blind negotiations are counterproductive. Other times, however, full disclosure of early settlement positions would be counterproductive and reduce chances of successfully resolving the case. Given the difficulty of settling multiparty construction cases, the mediator should at least consider the relative advantages and disadvantages of the blind method of negotiation. In this regard, the mediator should determine whether the advantages of blind negotiation outweigh any potential detriments.

71. Peter Contuzzi, *Should Parties Tell Mediators Their Bottom Line?*, 6 No. 3 DISP. RESOL. MAG. 30, 31-32 (2000).

72. *Id.* at 32.

73. *Id.* at 30-32.

74. *Id.* at 32.

75. Creo, *supra* note 64, at 206.

76. *Id.*

77. *Id.*

IV. ADVANTAGES TO BLIND NEGOTIATIONS

A. *Advantages to Claimants*

Initially, from the claimant's perspective, the use of blind negotiations offers certain advantages. First, a claimant may make concessions to his true bottom line without worry that it will be published and, in the event of impasse, used as a starting point for future negotiations. A claimant and his counsel are fully aware of this risk in open negotiations and are sometimes reluctant to disclose a true bottom line because they want to "save room" for future negotiations. Blind negotiations allow a claimant to move to his lowest number without repercussion in the event of impasse. Blind negotiation gives a claimant substantial flexibility in the event that the case does not settle. A claimant can stay with his stated bottom line, move to a higher number, or continue to make concessions and move to a lower number. By providing a claimant with the protection to go to his true bottom line, the blind negotiation increases opportunities to settle the case during the mediation.

Second, a claimant will have slightly more information than the other parties to the mediation. A claimant will know the total amount offered to settle the case as well as the total demand. Although the claimant does not know the individual contributions that comprise the offer, he may have a better feel as to whether the case can settle and for potential settlement ranges. Moreover, a claimant can adjust his demand to show progress or to close a gap as required to keep negotiations moving.

The use of blind negotiations is particularly beneficial to a claimant in situations where the defendants generally agree on the total settlement value of the case but disagree on their relative contributions to reach that amount. Under these circumstances, a defendant will often agree to pay a set percentage of the reasonable settlement value of the case. For example, if a defendant determined a case had a settlement value of \$700,000 and that he was responsible for half of the settlement, the defendant would have authority of \$350,000. If, in open negotiations, the claimant indicated it would accept \$600,000, the danger exists that the defendant with authority of \$350,000 would reduce its contribution toward settlement from \$350,000 to \$300,000 to reflect his view of the proper liability allocation. Under the blind approach, the

claimant can reduce his demand in order to settle the case without fear that the defendants will reduce their relative contributions.

B. Advantages to Defendants

Blind negotiations also offer advantages to defendants. First, defendants can offer whatever amounts they deem appropriate to settle the case without fear that their highest offer at mediation will become the starting point for future negotiations.⁷⁸ Second, defendants need not worry that their contributions in any single case will become public and, in effect, set a precedent for negotiations. Often this confidentiality is equally important to the defendants, their insurers, and their lawyers. Third, defendants negotiating in the blind do not need to worry that their contributions towards any given settlement will be viewed as disproportionate to the contributions of other parties. Because the ultimate settlement amount and individual contributions remain confidential throughout the entire process, no party needs to worry about complaints regarding the proportionality of its contributions. Instead, the focus remains on each individual defendant and whether he believed his payment was fair in exchange for a release of claims from all other parties.

C. Advantages to Mediator

Multiparty mediations of any sort can be difficult based solely on the number, extent, and complexity of disputed issues and parties. The degree of difficulty increases when the negotiating styles of the participants or personalities create additional friction or hurdles to settlement. One well-known author analyzed negotiating styles and categorized styles broadly as either "cooperative" or "competitive."⁷⁹ Common traits employed to distinguish between these two diverse styles are as follows:⁸⁰

78. A related benefit also exists. Where both the defendants and plaintiffs have the freedom to move to settlement positions without fear that the numbers or their positions will become public, defendants will benefit from this added flexibility.

79. CRAVER, *supra* note 25, § 2.02.

80. *Id.* § 2.02(1). See also ROGER FISHER & WILLIAM URY, GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN 9 (Bruce Patton ed., 1981).

<u>Cooperative/Problem-Solving</u>	<u>Competitive/Adversarial</u>
Move Psychologically <i>Toward</i> Opponents	Move Psychologically <i>Against</i> Opponents
Try to Maximize <i>Joint</i> Return	Try to Maximize <i>Own</i> Return
Seek Reasonable Results	Seek Extreme Results
Courteous and Sincere	Adversarial and Disingenuous
Begin with Realistic Opening Positions	Begin with Unrealistic Opening Positions
Rely on Objective Standards	Focus on Own Positions Rather Than Neutral Standards
Rarely Use Threats	Frequently Use Threats
Maximize Information Disclosure	Minimize Information Disclosure
Open and Trusting	Closed and Untrusting
Work to Satisfy Underlying Interests of Opponents	Work to Satisfy Underlying Interests of Own Client
Willing to Make Unilateral Concessions	Attempt to Make Minimal Concessions
Reason with Opponents	Manipulate Opponents

Authors also have noted the distinction between principled and positional bargaining, hard and soft bargaining, and win-lose and win-win negotiations.⁸¹ By negotiating in the blind, the mediator has the opportunity to defuse some of the hard bargaining tactics typically used by “competitive/adversarial” negotiators. Such negotiators’ attempts to manipulate opponents, use threats, commence unrealistic opening positions, or seek extreme results can all be mitigated, at least to some degree, through the use of blind negotiations. For example, in the hypothetical case discussed earlier of the six defendants, if one defendant opens up with an unrealistically low number in open negotiations or indicates he would not contribute toward settlement, this often chills or adversely affects the negotiation

81. *Id.* at 56–57 (discussing the importance of creating options for “mutual gain”); RONALD M. SHAPIRO & MARK J. JENKOWSKI, *THE POWER OF NICE: HOW TO NEGOTIATE SO EVERYONE WINS—ESPECIALLY YOU* 27-61 (1998) (discussing the dangers of “I win – you lose” negotiations and emphasizing the benefits of “win-win” negotiations).

process. This defendant's extreme position may lead the other defendants to take extreme positions in response. By negotiating in the blind, one party's extreme position will not necessarily infect the entire process.

The second advantage to mediators is the ability to buy time to respond to unreasonable or extreme bargaining positions. If one defendant starts unreasonably low but another defendant is willing to put in money early, the mediator can allow one party to essentially "over-contribute" early in the process to further the negotiation process. As the parties get closer to resolution, a party that is too low may adjust its position and ultimately make a significant contribution while the other party that "over-contributed" can reduce its proportionate share later in the process. The use of confidential or blind negotiations allows the mediator to use early progress from certain defendants to increase chances that by the end of the mediation, he will be able to secure reasonable contributions from all parties.

Blind negotiations also help mediators manage perceptions of the parties. Mediators must acknowledge that individuals participating in bargaining are necessarily competitive. Even in the classic "win-win" negotiation setting, each party would like his win to be slightly better than the others.⁸² Similarly, when participants use cooperative techniques to expand the overall benefits of settlement to all parties, some parties will simultaneously continue to employ competitive tactics that enable them to claim victory at the mediation.⁸³ Where the parties do not know the final settlement number and do not know what the other parties paid, but do know that they accomplished a settlement within their stated goals, is it much easier to declare or claim victory in the negotiations. Cases are less difficult to settle when all parties perceive they were victorious. The blind negotiation approach increases this chance.

Blind settlement negotiations also help limit the tactic referred to as "nibbling." Nibbling is the practice of negotiators who seek to negotiate to an apparent resolution based on a recommendation or apparent authority, and then later attempt to reopen negotiations when the agreement is documented.⁸⁴ Under this technique, negotiators "agree" to final settlements with apparent client

82. SHAPIRO & JENKOWSKI, *supra* note 81, at 45–46.

83. CRAVER, *supra* note 25, § 9.02.

84. *Id.* § 10.02(10)(a).

authority. All parties are then pleased with the agreement and develop a mindset that the case is settled. Later, one party will indicate that he is unable to secure final authority and then seeks to negotiate additional concessions.⁸⁵ Although the tactic seems obvious, it is quite frequently used and successfully employed.⁸⁶ Where the positions of all parties are confidential, the mediator can control each party and declare a settlement exists only when it in fact has final authority. Further, because the final settlement terms are confidential, a party only knows its contribution and is unable to determine where it can most effectively “nibble” at the positions of other parties.

The blind negotiation technique also helps the mediator focus parties on the particular case at issue as opposed to future cases. In other words, defendants often times fight the request to contribute towards a settlement or to increase an offer in fear that the move will affect negotiations in future cases. The same is true for claimants and claimants’ lawyers that express a reluctance to lower a demand. The parties and their counsel may fear that concessions would be seen as a weakness that could affect other cases. However, when the ultimate settlement and each party’s contribution to the settlement remain confidential, no precedential value attaches to the result. This greatly increases the chances that the parties will negotiate on the specific case at issue and not on unknown or unrelated cases that may occur in the future.

Negotiating in the blind also helps avoid the parties present surprises with regard to the positions of co-defendants or co-claimants. These surprises are often in the form of demands or offers that frequently ruin mediation negotiations.⁸⁷ For example, in open negotiation parties may say that they will move only conditioned upon proportionate moves from other parties. Parties, however, rarely agree on the same proportionality.⁸⁸ Another situation occurs when a defendant indicates he will not move again until the claimants have reduced their demand to what that defendant views as a realistic level. When the negotiations are

85. *Id.* (citing MARTIN E. LATZ, GAIN THE EDGE: NEGOTIATING TO GET WHAT YOU WANT 207 (2004)).

86. GARY KARRASS, NEGOTIATE TO CLOSE 109–10 (1985).

87. See Robert A. Creo, *How a ‘Blind-Trust Method’ Resolves Multi-Defendant Cases*, 17 ALTERNATIVES TO HIGH COST LITIG. 145 (1999) (discussing methods for handling defendants who have a great deal of mistrust among themselves).

88. *Id.*

blind, defendants do not know if claimants moved to a realistic level or if other defendants made contributions to a realistic level. Instead, defendants only know their current contribution and the gap that needs to be filled prior to settlement. This helps the mediator keep each party focused only on his contribution and the relative merits or demerits of continuing settlement.

V. DISADVANTAGES TO BLIND NEGOTIATIONS

Disadvantages to blind negotiations exist. First, a certain reluctance to proceed in the blind by all parties is present, particularly to those unfamiliar with the process. Lawyers and parties want more information as opposed to less.⁸⁹ Lawyers and their clients are constantly looking for a "leakage" of information from the mediator as to the positions taken by other parties or the facts provided by another party that will give them the upper hand in settlement negotiations.

Second, the blind system of negotiation affects the pace of negotiations. Typically, where parties know that their contributions are confidential, they may tend to start at a slightly lower level. Thus, negotiations begin slowly. The opening gaps are typically large and intimidating. Many times the opening gaps are larger than what might be the ultimate settlement value of the case. However, if the mediator is committed to proceeding under a blind approach, it is essential to keep the parties negotiating even when opening gaps are viewed as enormous. In this regard, the mediator should understand that the negotiation dynamics vary under the blind approach as compared to the open approach. Typically, the numbers will move up in roughly equal steps as the parties complete rounds of negotiation until parties near the end of their settlement authority or range. The mediator must understand this phenomenon and explain it to all parties, particularly claimants, in order to keep them engaged early in the process when the gap seems insurmountable.

Third, the mediator will be constantly subjected to questions regarding the relative positions of the parties. If the process is truly blind, the mediator must guard each party's position zealously. Besides disclosing the claimant's opening demand or the fact that a party is contributing toward the settlement, the mediator should not provide information as to the amount of any particular party's

89. *Id.*

contributions. The leaking or disclosure of any single number could be enough to allow one party to deduce or identify the remaining numbers and thereby frustrate the process. Further, if any party senses that the mediator did leak or will leak numbers, the chances of success will be reduced dramatically.

VI. ETHICAL CONSIDERATIONS IN BLIND NEGOTIATIONS

In blind negotiation, the mediator has important ethical responsibilities to the parties. Initially, the mediator must remain impartial throughout the mediation. In Minnesota, the General Rules of Practice for the District Courts confirm the obligation that the mediator must remain impartial.⁹⁰ The UMA requires that before accepting a mediation assignment, the mediator shall reasonably investigate all circumstances to determine whether any known facts exist that a reasonable individual would consider likely to affect the impartiality of the mediator.⁹¹ The UMA provides that the mediator be impartial, unless the parties agree otherwise, after disclosure of required facts.⁹²

The Model Standards of Conduct for Mediators also confirm the obligation of impartiality.⁹³ Standard II provides that a mediator “shall conduct the mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”⁹⁴ It also requires that the mediator actually decline the mediation assignment if he cannot conduct the mediation in an impartial manner.⁹⁵ Impartiality for these purposes is defined as “freedom from favoritism, bias or prejudice.”⁹⁶

In blind negotiations, a mediator often offers estimates to each party of the settlement position required from that individual party in order to resolve the case. In this regard, the mediator must not share information provided by a party in private caucuses regarding ultimate authority with any other party unless specifically

90. MINN. R. GEN. PRAC. 114 app. R. I.

91. UNIF. MEDIATION ACT (2003), *available at* <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>.

92. *Id.*

93. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

94. *Id.* at Standard II-B.

95. *Id.* at Standard II-A.

96. *Id.*

authorized to do so.⁹⁷ Circumstances may exist where the mediator has been informed that a claimant's bottom line is less than the total available authority of defendants. Knowing the claimant would settle for less, the available authority raises the question of whether the mediator can intervene and advise the defendants not to offer much. Conversely, the mediator may know that the defendants will offer more, and this raises the question of whether the mediator can advise the claimant to increase his demand. The answer to both of these questions is not based on impartiality and confidentiality concerns.⁹⁸ While the mediator may know a party's bottom line, he is obligated not to disclose the bottom line unless he has specific permission. Instead, the mediator is obligated to convey the stated authority as directed by each party.⁹⁹

However, the mediator in this situation must be careful that, when conveying positions different from a previously disclosed bottom line, he does not advise other parties that an interim position is a bottom line. This would be a misrepresentation and violate the mediator's standards of conduct as set out in Rule 114, the UMA, and the Model Standards of Conduct for Mediators.¹⁰⁰

Several other ethical issues arise during blind mediations, such as whether a mediator should give an evaluation of the case, draft the written settlement agreement, or testify as to whether the parties actually reached an agreement. Each issue arises in all mediations, but particularly in those where the blind method of negotiation is used.¹⁰¹ A full analysis of these ethical issues, however, is outside the scope of this article.¹⁰²

97. *Id.* at Standard V-B.

98. Vescovo et al., *supra* note 24, at 82.

99. *Id.* See also Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 693 (2001).

100. MINN. R. GEN. PRAC. 114 app. R. IV; UNIF. MEDIATION ACT § 8; MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard V.

101. In blind negotiations, the Mediator needs to be prepared to draft the written agreement, or at least participate in drafting the written agreement to assure that provisions are made to maintain the "blind" status of negotiations, and to incorporate any mediation disclosures required by statute. Minnesota Statutes section 572.31, subdivision 1, requires incorporation of certain language into any mediated settlement agreement as a condition to enforceability.

102. Those who are interested, however, see Vescovo et al., *supra* note 24, at 81-85.

VII. DOCUMENTING A MEDIATED SETTLEMENT

Negotiating the initial settlement agreement is certainly the key component to the success of any mediation. Just as critical to the success of mediation, however, is the preparation of a thorough, complete, and enforceable mediated settlement agreement document. This is particularly true in blind negotiations, where the mediator must structure the agreement and the payments in such a way as to maintain the confidentiality of the settlement amounts and contributions.

The agreement must be reduced to writing.¹⁰³ Historically, the mediated settlement agreement was a handwritten document that identified the key bullet points of the settlement. The mediated settlement agreement was signed or initialed by all parties and subject to an agreement to prepare a formal settlement agreement and release. More recently, in part due to the availability of technology, mediators prepare more detailed settlement agreements and releases for the parties' immediate signature. Regardless of the final form, the agreement should be completed before the parties leave the mediation. The documents are final binding expressions of the parties' settlement and typically address the following:

1. Consideration paid or accepted for the settlement;
2. Timing for payment;
3. Identity of payee and payer;
4. Formal scope of any negotiated release of claims and confirmation of whether the releases are mutual or one-way;
5. Issues of confidentiality, non-disparagement, or other peripheral terms of the agreement;
6. Inclusion of mediation disclosures, such as stating the mediator does not represent either party, the settlement agreement and release is binding and affects legal rights, and the parties have been

103. MINN. STAT. § 572.33 subdiv. 4 (2006).

represented by counsel and have authority to sign the agreement; and

7. Inclusion of enforcement provisions. Specifically, most mediated settlement agreements will include provisions indicating that all claims are released as set forth in the agreement but that all parties reserve claims relating to enforcement of the settlement agreement. Typically, there will be an attorneys' fees clause where the prevailing party is entitled to recover attorneys' fees in the event it is necessary to enforce provisions of the settlement agreement.¹⁰⁴

The mediator, when preparing the mediated settlement agreement and release, should consider any unique state or jurisdictional requirements necessary to assure enforceability of the mediated settlement agreement. In Minnesota, courts require specific mediation disclosures.¹⁰⁵ In *Haghgihi v. Russian-American Broadcasting Co.*, the Minnesota Supreme Court set aside the mediated settlement agreement because the agreement did not include required disclosures.¹⁰⁶ The court noted that Minnesota Statutes section 572.31, subdivision 1, provides that a mediated settlement agreement is not binding unless it contains statutory provisions.¹⁰⁷

104. In construction cases, typically other issues exist that should be addressed in a Mediated Settlement Agreement. Some issues that typically arise and that should be included by the mediator, regardless of whether the settlement negotiations are conducted openly or in the blind, are as follows:

- a. Handling of the retainage;
- b. Whether the release includes future, but as yet, undiscovered claims;
- c. Whether lien releases/satisfactions need to be prepared and exchanged;
- d. Whether closeout documentation is required between the parties;
- e. Addressing remaining work or punch list items;
- f. Whether any subrogation or indemnity rights exist; and
- g. Indemnity or protection in the event of future claims for contribution or indemnity, warranties for any in-kind work, or other alternative consideration.

Cf. Rodney A. Max, *Multiparty Mediation*, 23 AM. J. TRIAL ADVOC. 269, 288–89 (1999) (identifying some items to be included in the mediated settlement agreement). The balance are items that should be considered based on the author's experience.

105. See *Haghgihi v. Russian-Am. Broad. Co.*, 577 N.W.2d 927 (Minn. 1998).

106. *Id.* at 929-30.

107. *Id.* at 928. The 1996 statute stated:

A mediated settlement agreement is not binding unless it contains a

In addition to these key components, in a blind negotiation, the agreement should include confidential attachments for each individual party confirming the amount each defendant contributed to settle the case or, in the case of claimants, the amount each agreed to accept in return for settlement of the case. The confidential attachment for each party is attached to the copy of the general mediated settlement agreement provided to that respective party.¹⁰⁸ Usually each party initials the attachments, and the mediator retains the originals.¹⁰⁹ The mediator should develop some typical language to implement the confidential mediated settlement agreement without disclosing the settlement amounts. The mediator can funnel the settlement contributions through his trust account to protect the blind status of the negotiations.¹¹⁰ The

provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights.

MINN. STAT. § 572.35 subdiv. 1 (1996).

108. Language used by the author to implement the confidential settlement requires the use of attachments and reference to the attachments in the mediated settlement agreement. A typical agreement could provide as follows:

The Claimants agree to accept in full settlement of their claims and as consideration for the other terms and conditions of this Mediated Settlement Agreement the terms set out on the attached Confidential Exhibit A which shall be provided only to Claimants and their counsel and shall be held by the Mediator in accordance with the terms of this Mediated Settlement Agreement.

Each of the Defending Parties agrees to pay or extend the consideration described in their respective Confidential Exhibits described below in exchange for a full release of the claims as set out in this Mediated Settlement Agreement, which Confidential Exhibits shall be separately provided to each Defending Party and its counsel and shall be held by the Mediator in accordance with the terms of this Mediated Settlement Agreement.

109. The mediator needs to retain either the originals or a copy of the confidential attachments to monitor payments, and if necessary, take steps to confirm the parties have implemented terms of the confidential settlement agreement.

110. When mediating using blind negotiations, the settlement agreement must be structured to protect the confidential nature of each party's contribution or the ultimate settlement amount. This is done through the use of confidential attachments. The following language has been used with blind negotiations to implement the settlement and establish a payment structure that maintains

confidentiality. The structure calls for all payments to be made to the mediator's trust account and then distributed by the mediator:

CONSIDERATION.

- A. Consideration for the Claimants. The Claimants agree to accept in full settlement of their claims and as consideration for the other terms and conditions of this Mediated Settlement Agreement the terms set out on the attached Exhibit A which shall be executed by the Claimants and shall be held by the Mediator in accordance with the terms of paragraph C below.
- B. Consideration Extended by Defending Parties. Each of the Defending Parties agrees to pay or extend the consideration described in their respective exhibits described below in exchange for a full release of the claims asserted or that could have been asserted against and between the Claimants and Defending Parties in the above referenced matter as set forth above and in other terms and conditions of this Mediated Settlement Agreement, which exhibits shall be separately executed by each respective Defending Party and shall be held by the Mediator in accordance with the terms of paragraph C below.
 - Exhibit B – Consideration for Defendant 1
 - Exhibit C – Consideration for Defendant 2
 - Exhibit D – Consideration for Defendant 3
 - Exhibit E – Consideration for Defendant 4
 - Exhibit F – Consideration for Defendant 5
 - Exhibit G – Consideration for Defendant 6

All payments made shall be made within thirty days from the date of this Mediated Settlement Agreement, through checks payable to the Mediator's trust account. Mediator will disburse checks upon receipt of signed Mediated Settlement Agreement from Claimants and checks clearing trust account. Defending Parties may evidence their acceptance of these terms by signature of this document, however in the absence of a signature, Defending Parties shall also be deemed to have accepted the terms of this Mediated Settlement Agreement by submitting payment of consideration reflected in this Agreement. All Parties to this Agreement have advised Mediator that they accept the terms of this Agreement and signatures will follow.

- C. Confidentiality of Consideration. All parties hereto acknowledge the sufficiency of the consideration for this Mediated Settlement Agreement, but further agree that such consideration shall be kept confidential in accordance with the following terms:
 - (1) Exhibits A through G shall be separately executed by the respective party identified with said Exhibits.
 - (2) Exhibits A through G shall be held by the Mediator and shall not be disclosed to any of the other parties unless and until the Mediator determines, in his sole discretion, that it is necessary to disclose the contents of one or more of said exhibits in order to effectuate and enforce the terms of this Mediated Settlement Agreement.
 - (3) All Parties to this Mediated Settlement Agreement hereby agree that Mediator may release all checks provided within thirty days in one lump sum. In the event checks are not provided within thirty days as required by this Mediated Settlement Agreement, then Mediator is hereby authorized

mediator should be aware that he could be characterized as an escrow agent with regard to the funds¹¹¹ and must be careful only to release funds consistent with the terms agreed to by the parties.

Although the time required to prepare a formal release can be extensive, the time is well spent because it helps avoid the negotiation of every term and interpretation of the handwritten settlement agreement. Instances exist, however, when the use of a handwritten, bullet point, broad-form mediated settlement agreement is appropriate. In those instances, the mediator should consider inserting a provision that confirms that the parties reached a binding and enforceable settlement agreement and that in the event of any final dispute over language, the mediator shall be the final arbitrator of the language. In most situations, if the mediator has the ability to resolve any disputes regarding the final settlement language, the parties tend to be reasonable and the final agreement tends to be created without further mediator involvement. Where, however, the parties are unable to agree upon final language, the mediator can resolve the dispute subject to his interpretation of the parties' intentions. By agreeing that the mediator can resolve disputes regarding final release language, the parties ensure a settlement and substantially reduce the potential of the settlement falling apart.

VIII. CONCLUSION

Unlike the construction project, construction mediation lacks plans and specifications. The cliché that "mediation is more an art than a science" may be accurate.¹¹² Every mediation takes its own course, and each mediator has his own style, which reflects his

to advise Plaintiff of the identity of any parties that have not made payments, and Plaintiff may contact non-paying parties directly to secure payment.

111. *Black's Law Dictionary* defines "escrow" as "[t]he general arrangement under which a legal document or property is delivered to a third person until the occurrence of a condition." BLACK'S LAW DICTIONARY 584 (8th ed. 2004). Arguably, a mediator holding settlement funds for a third party pending receipt of a signed agreement fits this definition. The author is aware that the Attorney's Liability Assurance Society, Inc. (ALAS), a professional liability insurer for attorneys, has advised at least one firm that a mediator holding settlement funds could face liability as an escrow agent. No cases have been located, however, to support or refute this position.

112. Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 942 (1997). See also RYMAN, *supra* note 19, at 8, 9; Max, *supra* note 104, at 289.

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personality.¹¹³ The mediator must take his individual style and use all the tools available to navigate parties toward the ultimate goal: a negotiated resolution. Although construction mediations are complex, time consuming, and flush with legal, factual, and personal disputes, settlement potential exists. Settlement provides closure, reestablishes and preserves relationships, and allows the parties to control their destiny.¹¹⁴ The use of blind negotiation can dramatically increase a mediator's ability to successfully resolve construction disputes and secure the benefits of a mediated resolution.

113. NADJA M. SPEGEL ET AL., NEGOTIATION: THEORY AND TECHNIQUE 20–21 (Butterworths 1998).

114. FISHER & URY, *supra* note 80, at 23 (addressing negotiation strategies, styles, and results).